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Supreme Court, U.S.
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In The

Supreme Court of the United States

ERNESTO R. VASQUEZ,

Petitioner,

v.

LOS ANGELES COUNTY ("LA County"), DON KNABE, GLORIA MOLINA, YVONNE B. BURKE, ZEV YAROSLAVSKY, and MICHAEL D. ANTONOVICH, in their official capacities as Supervisors, LA County,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court's flawed Establishment Clause jurisprudence has promoted the removal of religious symbols from public places and the purging from our public conscience of Christianity's role in our Nation's history. The current approach to deciding cases under the Establishment Clause has created a jurisprudence that is hostile toward religion. This case presents an opportunity for the Court to abandon its much maligned jurisprudence in favor of one that respects our Nation's religious heritage.

Petitioner Ernesto R. Vasquez is challenging the Los Angeles County's policy decision to remove a small cross from its official seal. For nearly 50 years, the cross on the county seal stood as a recognition of the influence of the church and the missions of California. In June 2004, however, this small cross became the target of an official policy that singled it out for removal simply because it was a Christian symbol.

1. Whether a constitutional challenge to a government policy that targets a symbol for removal from public places because it is Christian states a claim under the Establishment Clause.

2. Whether the Ninth Circuit erred in dismissing Petitioner's complaint for failure to state a claim when it weighed competing inferences drawn from the factual allegations in the pleadings and accepted Respondents' contrary evidence.

PARTIES TO THE PROCEEDING

The Petitioner is Ernesto R. Vasquez ("Petitioner").

The Respondents are Los Angeles County ("LA County"), Don Knabe, Gloria Molina, Yvonne B. Burke, Zev Yaroslavsky, and Michael D. Antonovich, in their official capacities as Supervisors, LA County ("Respondents").

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OPINIONS BELOW

The opinion, App. 3a, appears at 487 F.3d 1246. The unpublished district court opinion appears at App. 29a.

JURISDICTION

The opinion of the panel was issued on May 15, 2007. A petition for panel rehearing and a petition for rehearing en banc were denied on July 5, 2007. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioner is an adult resident of LA County, a state and municipal taxpayer, and a citizen of the United States. He is employed by the county and has daily contact with the County of Los Angeles Official Seal ("LA County Seal"). App. 6a, 8a, 55a.

Petitioner is a devout Christian, and he objects to Respondents' removal of the cross from the LA County Seal because this official policy conveys a message of disapproval of and hostility toward Christianity and

sends a clear message to him and other Christians that they are outsiders, not full members of the LA County community. Additionally, Petitioner objects to the use of his tax money and the expenditure of municipal and/or state funds and tax dollars to support Respondents' policy. App. 6a, 55a

Respondents Knabe, Molina, Burke, Yaroslavsky, and Antonovich are Supervisors for Respondent LA County and members of the LA County Board of Supervisors, which is the governing body for LA County. As Supervisors, these Respondents are responsible for creating, adopting, and implementing the policies, practices, and customs of LA County, including the policy to remove the cross from the county seal. App. 4a, 56a.

Respondent LA County officially adopted the former LA County Seal in 1957. The seal was displayed on county buildings, vehicles, flags, stationary, forms, commendations, uniforms, and elsewhere throughout the county. App. 14a, 56a-57a. The revised seal without the cross is similarly displayed.

The LA County Seal, as adopted in 1957, contained symbols of historical and cultural significance to the residents of the county and did not convey an impermissible, state-sponsored religious message. Included in the LA County Seal was a small cross, which represented the influence of the church and the missions of California. The LA County Seal also included an image of the goddess Pomona standing on the shore of the Pacific Ocean with the San Gabriel Mountains in the background; engineering

instruments that related to the industrial construction complex of LA County and LA County's contribution to the conquest of space; a depiction of the San Salvador, the Spanish galleon that Cabrillo sailed into San Pedro Harbor on October 8, 1542; a tuna that represented the fishing industry of LA County; a depiction of Pearlette, a championship cow, which represented the dairy industry; a depiction of the Hollywood Bowl, which indicated cultural activities, with two stars representing LA County's motion picture and television industry; and images of oil derricks that were symbolic of the oil fields that were discovered on Signal Hill. Surrounding the seal were the words "County of Los Angeles California." App. 4a-5a, 57a.

On June 1, 2004, Respondents created and adopted an official policy of singling out the cross for removal from the LA County Seal because it was a Christian symbol. Pursuant to this policy, however, Respondents did not single out the large and prominent image of the polytheistic goddess Pomona for such treatment. App. 5a, 57a-58a.

The LA County Seal, as adopted in 1957, did not convey an impermissible religious message; it conveyed a historical and cultural message that was important to county residents, including Petitioner. However, by creating and adopting a policy that targeted the cross for removal and exclusion as one of the historical and cultural symbols of the seal because it is a Christian symbol, Respondents have now conveyed a message of *hostility* toward Christianity. App. 4a-6a, 57a.

Respondents' purpose for creating and adopting their official policy to target the cross for disparate and hostile treatment was anti-Christian and motivated by hostility toward Christianity and its cultural and historical significance to the residents of LA County. App. 5a-6a. This policy was improperly influenced by the American Civil Liberties Union ("ACLU"), an organization with a reputation for seeking to remove Christian symbols and Christian influences from public places.[1] App. 5a-6a, 57a-59a.

The effect of Respondents' policy is to convey a message of disfavor of and hostility toward Christianity, thereby sending a message to Christians, including Petitioner, that they are outsiders, not full members of the political community. App. 6a.

As Petitioner alleged in his First Amended Complaint, the implementation of Respondents' policy would cause additional and repeated injury to Petitioner each day that he goes to work for LA County or is otherwise exposed to the anti-Christian message conveyed by the seal without the cross. As a consequence of Respondents' policy and its implementation, Petitioner will alter his behavior to avoid this additional, direct injury. Moreover, Respondents' anti-Christian policy is funded by and has resulted in the expenditure of thousands of municipal and/or state funds and tax dollars, causing further direct injury to Petitioner. App. 6a, 8a, 56a, 59a-60a.

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[1] The ACLU did not object to the large image of the polytheistic goddess Pomona.

After the filing of Petitioner's First Amended Complaint, Respondents implemented their policy and removed the cross from the official county seal, thereby causing the irreparable harm alleged in the First Amended Complaint, including the harm caused by the expenditure of thousands of tax dollars. And this harm continues today.[2] App. 5a.

Petitioners timely filed a petition for panel rehearing and a petition for rehearing en banc. On July 5, 2007, the petitions were denied.

REASONS FOR GRANTING THE PETITION

I. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE POLICY DECISIONS THAT EXHIBIT HOSTILITY TOWARD OR DISFAVOR OF THE CHRISTIAN RELIGION.

This Court has previously stated that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.

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[2] Respondents also replaced the goddess Pomona with an "image of a Native American Woman holding a basket." App. 5a. And they removed the images of the oil derricks and added the image of a building claimed to be an image of a mission, which does not contain a cross. App. 5a, 18a. These changes were not part of the policy adopted on June 1, 2004, but were made subsequent to the filing of this lawsuit and with the approval of the ACLU.

290, 314 (2000) (internal citation omitted). One such way in which these "values" are eroded is by a government policy decision that singles out religious symbols for removal from public places because they are Christian. An evenhanded application of prior precedent should compel a reversal in this case. Unfortunately, with little exception, the application of this Court's modern day Establishment Clause jurisprudence has led the law to exhibit hostility toward religion, thereby promoting such policy decisions. Consequently, a substantial revision of this Court's jurisprudence is in order.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First

Amendment forbids an official purpose to disapprove of a *particular* religion or of religion in general.") (emphasis added).

Despite an occasional appearance of neutrality and suggestion that the Constitution is not hostile toward religion, the reality is that this Court's Establishment Clause jurisprudence is frequently used as a blunt instrument against all thing religious—particularly those that are Christian. This case is just such an example.

While some on this Court still believe that our Constitution "affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any," *Lynch*, 465 U.S. at 673, this case will afford the Court the opportunity to breathe new and lasting life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts. As this case shows, the Court's prophetic observation in *Lynch* that "[a]nything less would require the callous indifference [that] was never intended by the Establishment Clause," thereby bringing "us into war with our national traditions" has come to fruition. It is time to reverse this harmful and divisive trend.

II. THE PANEL'S DECISION EVISCERATES CLAIMS ADVANCED UNDER A HOSTILITY TOWARD RELIGION THEORY.

By dismissing Petitioner's allegations of an illicit purpose and effect and crediting Respondents' contrary, self-serving assertion that they were simply

seeking to avert an Establishment Clause violation, the panel's decision creates a bright line rule that essentially undermines all claims advanced under a hostility toward religion theory. Permitting the panel's decision to stand would pave the road for removing all religious imagery or references from official recognition because they represent religion. Banned from public use would be the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity), "In God We Trust" on our coinage, religious stamps the U.S. Postal Service issues at Christmas and Easter, the many white crosses marking the grave sites of our Nation's fallen veterans buried at National cemeteries, the numerous war memorials containing crosses, and even the names of our cities, including Los Angeles, San Francisco, and Corpus Christi, and all official signs and symbols on which these names appear. The pernicious effect of the panel's decision is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

In this case, by removing a long-standing and historically significant religious image from an official seal *because* it is a symbol of Christianity, Respondents have conveyed an impermissible message of hostility toward, and disapproval of, religion. For nearly five decades, the small cross on the LA County Seal stood as the official recognition of the influence of the church and the missions of California. In June 2004, however, this small cross became the target of

an official government policy that singled it out for removal *because it is Christian*.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., County of Allegheny v. ACLU,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"); *Lynch,* 465 U.S. at 673 ("hostility"). Our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (emphasis added); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion); *see also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general").

A state-sponsored message of disapproval of Christianity and its symbols, as evidenced by Respondents' policy, sends a message to Petitioner and other Christians that their religion is disfavored in the community. *See County of Allegheny,* 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508

U.S. at 520 (striking down a law that targeted a particular religious practice).

More recently, in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> [The removal of the religious symbol], based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Id. at 704.

While the language from these cases appears to support a "hostility toward religion" claim, the practical reality is that such claims are given little traction by the lower courts, as this and other cases demonstrate.[3] *See, e.g., American Family Ass'n v. City*

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[3] The Fifth Circuit has at least acknowledged that removing Christian symbols, such as a cross, from all displays "evinces not neutrality, but instead hostility, to religion." *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (holding that the

& County of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that San Francisco's resolution condemning a religious organization's advertisement opposing homosexuality did not violate the Establishment Clause); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion," but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (upholding a government display of an anti-Catholic statue against an Establishment Clause challenge). At a minimum, there is much confusion in the lower federal courts that only this Court can clarify. *See* App. 23a ("We have noted that because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, we have little guidance concerning what constitutes a primary effect of inhibiting religion.") (internal quotations and citation omitted).

As the case law would seem to suggest, singling out the small cross on the LA County Seal for disfavored treatment and removal because it is a symbol associated with Christianity violates the Establishment Clause mandate that government in

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inclusion of a Christian cross in the city insignia did not violate the Establishment Clause); *see also ACLU v. Mercer County*, 432 F.3d 624, 638 (6th Cir. 2005) (upholding the public display of the Ten Commandments and observing that the "repeated reference to 'the separation of church and state'" is an "extra-constitutional construct [that] has grown tiresome").

our democracy must remain neutral and may not take action that exhibits hostility toward a particular religion.

In the final analysis, the panel's decision essentially eviscerates this plethora of case law prohibiting government disapproval of or hostility toward religion by allowing such claims to be dismissed at the pleading stage based on nothing more than Respondents' bald, self-serving assertions. This decision must be reviewed and reversed, allowing, at a minimum, Petitioner to develop and present a full record supporting his claims.

III. THIS COURT SHOULD REVERSE AND REMAND BECAUSE THE PANEL BELOW DID NOT APPLY THE PROPER STANDARD UNDER FED. R. CIV. P. 12(b)(6) WHEN IT DISMISSED PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CLAIM.

The error of the panel's decision is compounded by the fact that the case was dismissed at the pleading stage pursuant to a motion brought under Fed. R. Civ. P. 12(b)(6).

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. *See* Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.

While the long-standing and often quoted "no set of facts" proposition set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) was abrogated by this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007), this recent decision did not change the fundamental Rule 12(b)(6) standard that is applicable in this case. For example, in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), a cased decided after *Bell Atlantic Corp.*, this Court reversed a dismissal under Rule 12(b)(6), noting that it was error for the appellate court to conclude that the allegations in question were too "conclusory" for pleading purposes. The Court reemphasized the liberal Rule 8 pleading standard, stating that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 2200 (quoting *Bell Atlantic Corp.*, 127 S.Ct. 1964 (quoting *Conley v. Gibson*, 355 U.S. at 47)). This is the applicable standard that the panel failed to apply in this case.

It is well established that when reviewing the motion to dismiss, the panel was required to read the complaint in the light most favorable to Petitioner and accept as true all material allegations in the complaint, as well as reasonable inferences drawn from them. *See Erickson,* 127 S.Ct. at 2200 ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."). Here, the panel failed to apply this standard by dismissing Petitioner's allegations and crediting Respondents' self-serving assertions to the contrary.

In its decision, the panel appeared to acknowledge that a "hostility toward religion" claim is viable under the Establishment Clause, thus acknowledging that Petitioner had advanced a cognizable legal theory. In fact, the panel stated, "If we assume for the moment that the revised seal did, in fact, convey an anti-Christian message, then it is understandable that Vasquez would feel aggrieved by that message. He should, accordingly, be able to seek a legal remedy.... In short, Vasquez has alleged a sufficiently concrete injury arising out of his direct contact with the purportedly offensive anti-religious symbol at issue in this case." App. 12a-13a. Despite this nod to the legitimacy of Petitioner's claim, the panel ultimately ignored its own findings and dismissed the complaint at the pleading stage.[4]

The panel also improperly weighed evidence contrary to the Rule 12(b)(6) standard. In its decision, the panel stated, "Vasquez claims that [Respondents'] purpose in removing the cross from the seal was 'anti-Christian' and 'motivated by hostility toward Christianity,'" App. 21a, (which, as noted previously and discussed further below, advances a cause of action under the Establishment Clause). However, in contradiction to Petitioner's claims, the panel "accepted [Respondents'] explanation and concluded that '[i]n the instant case, it is more plausible the

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[4] Interestingly, the panel did not dismiss Petitioner's complaint on standing grounds—apparently concerned that such precedent would upset future cases seeking to challenge and remove religious symbols—instead preferring to make the hostility toward religion claim a "non-claim."

County was seeking to avoid the expense associated with defending a threatened lawsuit over an alleged Establishment Clause violation in making its decision to remove the cross from the seal.'"[5] App. 21a. By weighing competing inferences drawn from the factual allegations in the pleadings, accepting Respondents' contrary evidence, and dismissing the complaint, the panel disregarded the standard governing motions to dismiss.

Moreover, the panel compounded its error by ignoring Petitioner's claim that Respondents' alleged purpose was a "sham" because Respondents were working with the ACLU to essentially stage such an occurrence. As alleged in the complaint, "[Respondents'] policy, practice, and/or custom to remove the cross from the LA County Seal was improperly influenced and continues to be improperly influenced by the American Civil Liberties Union, an organization that has a reputation for seeking to remove Christianity from the public square. While [Respondents] are cooperating and conferring with representatives from the American Civil Liberties Union regarding the removal of the cross, [Respondents] have refused to place this issue before

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[5] This evidentiary finding also contradicts Petitioner's allegation that removing the cross has cost Respondents, and therefore the taxpayers, "thousands of municipal and/or state funds and tax dollars." App. 59a; *see generally* App. 8a-9a. Indeed, Petitioner contends that discovery will show that this figure is much higher. Thus, "avoid[ing] expense" was hardly Respondents' motive or purpose for removing the cross.

the citizens of LA County for a vote, despite requests to do so."[6] App. 58a; *see also* App. 6a.

Indeed, the panel's truncated approach to the "purpose" inquiry is contrary to this Court's precedent. In *McCreary County v. ACLU*, 545 U.S. 844 (2005), this Court harshly criticized such an approach, stating, "The Counties would read the cases as if the purpose enquiry were so naïve that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance

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[6] Respondents' sham purpose is further evidenced by the fact that no reasonable person would conclude that the tiny cross that had been a part of the LA County seal since 1957 violates the Establishment Clause. *See Van Orden*, 545 U.S. at 677 (upholding the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol).

Moreover, Respondents' reliance on the ACLU in this matter was unreasonable. For example, in *ACLU v. Mercer County,* 432 F.3d 624 (6th Cir. 2005) (upholding the public display of the Ten Commandments), the Sixth Circuit stated, "Our concern is that of a reasonable person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." *Id.* at 638 (quoting ACLU website).

The Sixth Circuit stated further:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.

Id. at 638-39 (citations omitted).

of current circumstances." *Id.* at 863-864. As the case law demonstrates, courts should scrutinize the government's actual purpose based on a well-developed record and not merely accept the self-serving statements of the government. *See, e.g., Edwards,* 482 U.S. at 578; *McCreary County,* 545 U.S. at 862 ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act.") (internal quotations and citation omitted). Thus, the panel's "purpose" analysis, in light of the Rule 12(b)(6) standard, was error as a matter of law.

The panel's approach to analyzing the "effects" of Respondents' action fares no better. As this Court explained, when evaluating the effect of government action under the Establishment Clause, the court must ascertain whether the challenged action is "sufficiently likely to be perceived" as a disapproval of the Petitioner's religion. *County of Allegheny,* 492 U.S. at 597 (citations omitted) (emphasis added); *see also Lynch,* 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). This inquiry is from the perspective of an informed reasonable observer. *See County of Allegheny,* 492 U.S. at 631 (concurring opinion) (stating that the "endorsement test" is "highly context specific").

Furthermore, "the Establishment Clause forbids a State to hide behind the application of formally neutral

criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307 n.21 (internal quotations and citations omitted).

In its decision, the panel disregarded Petitioner's allegations based on its dubious inference that "[Respondents'] removal of the cross is more reasonably viewed as an effort to restore their neutrality and to ensure their continued compliance with the Establishment Clause," seeking to prove the assertion by claiming that this is "demonstrated by the fact that [Respondents] removed the cross only after the presence of crosses on other municipal seals had been held to be unconstitutional" and citing several cases as support. App. 25a. What is remarkable about the panel's assertion—in addition to being contrary to the allegations in the complaint—is the fact that the latest case cited by the panel was decided in 1995—*nine years prior to Respondents' removal of the cross in this case*. To conclude that Respondents' 2004 decision to remove the cross was made as a result of cases decided in other circuits in 1995 and prior is, to put it kindly, a stretch. *Cf. Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993) ("We do not hold that any depiction of a cross on an official insignia in California violates the [California Constitution].").

In the final analysis, the panel essentially allowed Respondents to rebut Petitioner's *prima facie* case of hostility toward religion based on contrary factual assertions and inferences the panel drew from a record that does not yet fully exist. The panel then further failed to recognize that rebutting Petitioner's assertions is not even the end of the inquiry—Petitioner should be allowed to demonstrate

that Respondents' rebuttal argument is mere pretext masking an illicit purpose, as alleged in the complaint.

IV. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO INCONSISTENT RESULTS THAT PROMOTE HOSTILITY TOWARD RELIGION.

The Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring in the judgment) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

Inconsistent results—results which tend to promote hostility toward religion—in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *ACLU v. Schundler*, 168 F.3d 92, 113 (3rd Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence.").

This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing for the first time a case involving hostility toward religion. This Court should grant review of this case in order to provide needed guidance for the lower courts and to develop a legal framework that stems the tide of cases disfavoring religious symbols, particularly those symbols that have long

been a part of the history and traditions of the many cities and towns across this Nation.

CONCLUSION

While it appears that the panel's decision conflicts with several decisions from this Court so that consideration is necessary to secure and maintain uniformity of decisions on an important issue of federal law, the crux of the problem is that this Court's Establishment Clause jurisprudence is in disarray and in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the present Establishment Clause framework, which tends to be hostile toward religion, in favor of a workable standard that is not only capable of consistent application, but that is consistent with our Nation's religious history.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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